THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ZANGO, INC., Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	NO. 07-CV-00797 JCC ZANGO'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

> We have concluded Seekmo is not malicious. We have removed the block to your URL . . . .

E-mail from Jim Meem, Manager of Malware Research Center at PC Tools, to Zango, March 28, 2007 at 11:48 p.m. (emphasis supplied).[1]

In its opposition, PC Tools attempts to divert attention from the harm it is causing Zango by "fighting the last war"—the completely remedied, and hence irrelevant, pre-2006 business practices of the former 180 Solutions. In fact, beginning January 1, 2006, Zango revamped its

[1] Declaration of John Sarapuk in support of Defendant's Opposition to Motion for Temporary Restraining Order, at p. 49 of [and?] 114. Mr. Sarapuk states at paragraph 19 of his declaration that the Meem statement has been (or will be) read out of context. We do not believe this is accurate and encourage the Court to review the entirety of the e-mail string including, without limitation, the subsequent e-mails involving Mr. Meem through p. 55 of the Declaration.

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software and practices. Currently, in the words of Richard Purcell, a member of the Data Privacy and Integrity Committee to the Department of Homeland Security, "Zango products are not infections, viruses, malware or spyware." Although Mr. Purcell is one of the world's leading authorities on privacy and malware, this Court need not rely solely on his opinion. As recently as two weeks ago, representatives of the Federal Trade Commission (FTC) visited Zango's offices in Bellevue for general meetings on the company's software and practices and made absolutely no mention of any problems with either—or with anything else.

In its opening papers, Zango established the dramatic damage to its revenues and goodwill by PC Tools' ongoing actions. That harm is not disputed, and the "balance of harm" continues to tip dramatically in Zango's favor as the harm PC Tools claims it will suffer if the TRO issues is evanescent. PC Tools alleges, with no evidentiary support, it will lose its customers' confidence if PC Tools no longer identifies Zango as an infection. Those customers would surely deem it reasonable for PC Tools to rely on the investigation and conclusions by the relevant enforcement agency, the FTC.

II. FACTS

A. Zango is not "Malicious".

1. The FTC Order and Oversight Ensure Zango is not "Malware."

The Declaration of Kevin Osborn, Zango's Associate General Counsel and manager of its day-to-day compliance efforts, establishes that Zango's services and software are regularly reviewed by the FTC and are in compliance with all components of the FTC Order. Indeed, Zango's continued existence depends on transparency and compliance—being "purer than Caesar's wife." The key elements of the FTC Order include:

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- Post-January 1, 2006 Installation Not at Issue. Zango demonstrated to the FTC that installations of its software occurring on computers on or after January 1, 2006 presented no issues relative to the substantive areas addressed by the FTC in the consent agreement – namely, that consumers must give express consent for the installation of the software following clear and conspicuous notice; that ads served by the software are labeled as such; that channels are provided to enable customer feedback and complaints (and that adequate responses to those communications are timely made), and that customers have access to simple and standard uninstallation tools to remove the software from their computers if they so desire.

- Continuing FTC Authority. The FTC consent agreement requires Zango to demonstrate that it is in compliance with the agreement. Mr. Purcell's written report, attached to his previously filed declaration, complied with this requirement. Furthermore, Zango hosted two Washington, D.C.-based FTC lawyers at its offices in Bellevue on May 10, 2007, for a day of meetings and discussions about the company, its business model, current software distribution practices, and related subjects. One of those lawyers had been closely involved in the CID process. FTC representatives gave no indication during (or after) these meetings that the FTC thought Zango to be out of compliance with the consent agreement.

- Future Potential Penalties. The potential substantial monetary penalties for a violation of the consent agreement could result in Zango being unable to continue its business operations, meaning the end of a company started in 1999 and presently employing approximately 230 employees in six offices spread over four countries. The company and its employees understand that remaining in compliance is not a goal, but a mandate.

Osborn decl. ¶6.

2. PC Tools' Own Endorsement.

Tellingly, the strongest endorsement of Zango's position comes from PC Tools itself. Leaving aside, for the moment, the Jim Meem statement at the commencement of this brief, and accepting at face value the laudatory things PC Tools has said about itself and the thoroughness of its efforts appearing at paragraphs 4 through 7 of the Sarapuk Declaration, PC Tools admits the following:

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> 8. After comprehensive analysis, the MRC [Malware Research Centre] team assigns a level of risk using the following terms: Info & PUAs (Potentially Unwanted Applications) presenting no known risks . . . .
>
> **Current Classification of Zango Software**
>
> 22. On or before May 14, 2007, before Zango filed its lawsuit, PC Tools made the independent decision to reclassify three of Zango's software programs (Seekmo Search Assistant, Zango's Search Assistant, and Hotbar) as PUAs (potentially unwanted applications). As a separate and independent matter, PC Tools also decided to modify Spyware Doctor to allow for PUAs to avoid being detected and removed by Spyware Doctor's auto-scan function (On Guard) . . . .
>
> 23. As a result, the three Zango programs that Zango has put at issue are no longer automatically detected and removed by Spyware Doctor's On Guard auto-scan function because they are classified as PUA.

Sarapuk Declaration at ¶¶ 8, 22 and 23 (emphasis supplied). All Zango seeks by this TRO is an Order compelling PC Tools to implement this decision in those areas where it has not yet been implemented.

3. Mr. Edelman is a Long-Time Foe Without Credibility.

The hyperbolic and inaccurate accusations of Mr. Edelman are contradicted and rendered not credible by PC Tools itself—the statement by the head of PC Tools' Malware Research Center that Zango is "not malicious." Moreover, the latest version of Spyware Doctor Starter Edition—not coincidentally made available *two days ago*—no longer automatically removes Zango (while continuing to label it an "infection"). PC Tools would not do this if, as Mr. Edelman contends, Zango is malicious spyware. The FTC itself and PC Tools' unguarded admissions are more credible than the assertions of Mr. Edelman, a long-time foe of Zango and its predecessors.

As noted in the Declaration of Kevin Osborne, Mr. Edelman's bias is perhaps partially explained by a case with an embarrassing outcome for Mr. Edelman.

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> That matter, *Simios v. 180solutions, Inc.*, Case No. 05 C 5235 (N.D. Ill., filed Sept. 13, 2005), was dismissed – with prejudice – when it became clear that the primary putative class representative *had never had Zango/180solutions software installed on his computer*. One might have expected the putative plaintiffs' expert to have inspected the computer on which claims of nonconsensual installation of Zango/180solutions software were based, but in this instance it appears that inspection by Mr. Edelman either never occurred or he was unable to actually make the requisite identification.

Osborn decl. ¶ 12.

Substantively, Mr. Edelman mischaracterizes Zango in nearly all respects, as described in the Second Declaration of Gregg Berretta ¶¶7-38, filed herewith. Significantly, many of these criticisms were made by Mr. Edelman in comments opposing the terms of the FTC consent agreement. The FTC rejected those concerns, both in a written response to Mr. Edelman and in determining that no change to the negotiated settlement terms was necessary following consideration of Mr. Edelman's comments—comments duplicated here months after the fact. Osborn decl. ¶ 8; Second Berretta decl. ¶18.

B. Zango Continues to Suffer Harm.

PC Tools suggests that Zango is no longer suffering irreparable harm due to the release two days ago of Spyware Doctor 5.0.0.185 ("version 185"). This is not true for multiple reasons set forth in the Second Berretta Declaration, ¶¶ 2-5.

a. Prior versions still disable Zango: Many of the 100 million downloads of Spyware Doctor contain version 5.0.0.169, the version in wide distribution when the complaint was filed and which is still available across the internet, even if not from Google. Because version 169 does not contain an auto-update feature, the millions of users that installed 169 are effectively shut off from Zango as customers without even knowing it. To this day, version 169

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automatically disables Zango and the only cure for this is the relief sought by Zango.

b. Harm from "Cyberhawk." On May 30, PC Tools announced the acquisition of Novatix, a Colorado company marketing software called Cyberhawk. Testing of the Cyberhawk software showed that Zango software was damaged in nearly identical ways to Spyware Doctor version 169.

c. Even version 185 harms Zango: Zango's testing that current version 185 prevents Zango customers from upgrading to a paid "Premium Version" of Zango. This causes Zango lost revenue and increased support costs.

d. Ongoing Damage to Reputation/Loss of Goodwill: All PC Tools software continues to label Zango and our software titles as "infections" thereby causing unnecessary fear on the part of Zango customers. The modification of labels, while appreciated, does not go far enough to eliminate concerns that customers will have regarding Zango products. Clearly, when someone pays for the Premium version of Zango software, the software is not "Potentially Unwanted." Given Zango's plain language disclosures, ad labeling, and multiple notifications that its software is present on the user's machine, it is extremely unlikely that anyone currently using our software doesn't "want it."

III. ARGUMENT

A. The TRO Does Not Involve an Unconstitutional Prior Restraint of Speech.

1. This Motion Presents No First Amendment Issue.

PC Tools' actions raise no First Amendment issue. The subject matter of the TRO is PC Tools' computer program that enters the computer of another and physically removes Zango software. This is conduct, not speech. In this respect, the case has nothing in common with

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New.net, Inc. v. Lavasoft, 356 F. Supp. 2d 1071 (C.D. Cal. 2003). Our opponent correctly analyzes the Lavasoft holding:

> Based on these conclusions, the Court held that Lavasoft's classification of new.net's software, and Lavasoft's communication of that classification to computer users, was speech-protected by the First Amendment.

See Defendant's Opp. at 13 (emphasis supplied). We have no quarrel with this characterization of the holding, or with the holding itself. Lavasoft, however, involved a computer program far more modest than that at issue here. Quoting the District Court Judge:

> New.net complains that Lavasoft has: (1) unfairly targeted and has mislabeled new.net's software; (2) inaccurately associated new.net's software with "the worst of the worst" internet downloaders; and (3) recommended to computer users that new.net's program be uninstalled.

356 F. Supp. 2d 1071 at 1073 (emphasis supplied). Leaving aside the accuracy of Lavasoft's statements—the subject matter of the lawsuit—there is no dispute that this conduct is all speech. Zango has not sought a TRO because we have been inaccurately "targeted," "mislabeled," "associated . . . with," or "recommended [for deletion]." While any of these actions may, in fact, form the basis for a tort[2], they are not the primary basis on which this TRO has been sought. Instead, we seek relief from software distributed by PC Tools that enters the computers of third persons with whom we have an established relationship and—without notice to them—that is, without any speech at all—disables or removes Zango's software.

The distinction between speech and conduct is as old as the First Amendment itself. The Supreme Court most recently visited this issue in Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006), addressing (and affirming the prohibition of) law school conduct banning military recruiters. Some conduct is so inherently expressive that it

[2] Entire areas of the law—copyright, trademark, commercial disparagement, etc.—are premised upon the tortious consequences of "speech."

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must, in fact, qualify as speech. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); and Tinker v. Des Moines Independent Community School District, 390 U.S. 503 (1969) (black armbands worn by students). We trust that PC Tools does not contend this issue is present in this case. Absent such an announcement, we will ignore any further discussion of the First Amendment.

B. Zango's Tortious Interference Claim Has a Strong Likelihood of Success on the Merits.

Zango need only show "a fair chance of success on the merits" given that the balance of hardships tips decidedly in its favor. While Zango's harm is well-established, issuing the TRO would cause no burden upon PC Tools. Second Berretta decl. ¶6. However, even if Zango must show a strong likelihood of success, Zango's tortious interference claim readily meets that standard.

Before addressing the specific flaws in PC Tools' position, an initial point needs to be made about defendant's business. Without spyware and malware, or widespread consumer concern about them, PC Tools would cease to exist. The existence *and* promulgation of real or perceived threats to computer security is good for the defendant's business. The more alleged threats identified by antispyware products, the greater perceived value they have. Thus, PC Tools has a direct economic interest in maintaining Zango and as many "infections" as possible in its database. PC Tools' goal is to make money, not make the world safe for computer users.

PC Tools does not contest that Zango can establish the first two elements of the claim: existence of contractual relationships, and defendant's knowledge of same. PC Tools challenges only the proof of their intent and the wrongfulness of the same. PC Tools is wrong on both counts.

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1. Intent.

PC Tools claims it is not taking aim at Zango, and it is "merely incidental that PC Tools' classification decisions impact Zango." Opp. at 16. Even if this were true initially, it is not true now. As PC Tools notes, the harm experienced by Zango results from a classification *decision.* This is not happenstance, and it is especially not so given that for the better part of several months Zango has implored PC Tools to delete Zango from its database of suspect software. Dkt. # 7 at ¶¶ 14-16. Since defendant's refusal to accede to Zango's request is clearly a conscious, considered decision, it cannot be described as anything but intentional.

2. Improper Motive/Means

PC Tools makes two arguments why their actions are proper, and in the context of the industry in which it operates, they are so lacking in merit as to be frivolous.

First, PC Tools justifies the inclusion of Zango in its database of infections on the grounds of Zango's "long history of abuse." The "history" to which defendant refers is history that is more than 18 months old—a near eternity in the software industry. Lest that be deemed overstatement, consider that You Tube was founded in February 2005 and 20 months later was such a social and economic phenomena that Google purchased it for $1.65 billion. Zango's software is *not* the software that led to the FTC order—and PC Tools well knows it. PC Tools intentionally informs customers that they should be concerned about Zango, a false and damning characterization not shared by Mr. Meem, its own MRC director.

Second, PC Tools offers the "lemming defense"—everyone else is doing it, so I must be okay. See Opp. at 16 ("PC Tools is not the only anti-malware software provider that has classified Zango as potentially harmful"). The conduct of others is irrelevant for an obvious reason--they too may be (and in this case are) in the wrong, which is quite likely given they have

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the same profit incentives and business models as PC Tools. Moreover, other anti-malware providers do not cast aspersions on Zango. Dkt. 7 at ¶ 5. Thus, the differing treatment of Zango by various provides of anti-malware is not probative of propriety.

Zango has established a substantial likelihood of proving wrongfulness. PC Tools knows Zango is not malicious, but it is unwilling to take all steps logically consonant with that finding. The apparent reason is that it is in their financial interest to continue the harm they are causing.

C. The Court Has General Personal Jurisdiction Over PC Tools Because PC Tools' Own Evidence Establishes That Washington Residents Previously Have Downloaded PC Tools' "Spyware Doctor" 70,000 Times and Continue to Download the Software 700 Times Each Week.

"The Court may exercise general personal jurisdiction over a defendant when it has engaged in substantial or continuous and systematic business activities in the forum state." Expedia, Inc. v. Reservationsystem.com, Inc., No. C06-1580RSM, 2006 U.S. Dist. LEXIS 90848, at *7 (W.D. Wash. Dec. 14, 2006) (citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)). In *Expedia*, this Court noted that general jurisdiction focuses on the defendant's forum-related activity—regardless of whether that amount comprises only a small portion of the defendant's total business activity around the world:

> While only a small portion of Bookit's revenue and reservations may actually come from Washington, that doesn't change the fact that Bookit's sales through its website are intentional and entirely within Bookit's control, and sales do actually occur in this state.

Id. at *8 (further noting that Washington resident bookings from online travel site was "less than one percent" of total bookings and that bookings at Washington hotels, flights reserved by people in Washington, and Washington car rental bookings were each "less than one-tenth of one percent" of defendant's total bookings respectively).

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Here, PC Tools' "substantial or continuous and systematic" activities in Washington are plainly evident by the numbers—*numbers supplied by PC Tools*. "Spyware Doctor has been downloaded over 100 million times, and it continues to be downloaded *approximately a million times every week*." Dkt. #19 at 4 (emphasis added). Since PC Tools represents that 0.07 percent of all Spyware Doctor downloads during a recent month are from Washington residents, *see* Dkt. #18 ¶ 6, Washington residents download Spyware Doctor, for pay or for free, at a rate of approximately 700 times per week. Applying that percentage of Washington-based downloads to all 100 million downloads of Spyware Doctor, *Washington residents have acquired approximately 70,000 copies of defendant's software.* Just as this Court exercised general jurisdiction over the non-resident internet defendant in *Expedia*, the Court should do so here.

D. Zango's Response to the Request for an "Enormous" Bond.

We have no quarrel with the law regarding the size of the bond and leave this issue to the Court's discretion. We disagree, however, in the entirety with every reason articulated by PC Tools for a sizeable bond. PC Tools' assertions and our responses, are as follows:

PC Tools' Position	Our Response
PC Tools no longer would be able to provide the service upon which its customers rely.	PC Tools has already agreed that Zango should not be classified as malware. Zango is just trying to compel them to eliminate the remaining vestiges of this error. It is impossible that their customers might rely on this "service."
Zango could modify its software after such an order, and PC Tools could do nothing about it.	Zango is already being monitored by the FTC for compliance with the Order and the prohibition therein. In any event, PC Tools could come back to court if it wished.
Other third-party software	If other third-party software

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PC Tools' Position	Our Response
providers would be emboldened to file suit to challenge PC Tools' classifications of their software.	providers are similarly situated (although we are aware of none) they certainly should challenge the classification of their software.
Consumers likely would switch to one of many competitors in PC Tools' industry that are not shackled by an injunction.	We cannot see how this would happen. It is more likely a consumer would switch because its PC Tools software erased a Zango program that PC Tools itself had admitted was perfectly acceptable.

E. Motion to Strike.

Finally, pursuant to LR 8(g), Zango moves to strike in its entirety Exhibit 3 to the Declaration of Tarek F. Saad, a compilation of news articles retrieved from the internet. In our view, portions of the articles are true and portions are false. We lack the time in the 21 hours permitted for this response to separate the wheat from the chaff, they are unnecessary to PC Tools' position, in any event, and they are classic hearsay, much of it second-level hearsay, out-of-court statements within out-of-court statements.

DATED this 1st day of June, 2007.

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[signature]

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CERTIFICATE OF SERVICE

I hereby certify that on 6/1/07, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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